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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1270

ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

vs.

COMMISSIONER OF REVENUE,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

GEORGE R. JOHNSON
RALPH W. PETERSON
JOHNSON & EASTLUND
1702 Midwest Plaza Bldg.
Minneapolis, Minn. 55402
Tel.: (612) 339-8931
Attorneys for Petitioner

WARREN SPANNAUS
Attorney General
C. H. LUTHER
Deputy Attorney General
Centennial Office Building
St. Paul, Minnesota 55145
Tel.: (612) 296-3421
Attorneys for Respondent

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Respondent, Commissioner of Revenue of the State of Minnesota, opposes the granting of a writ of certiorari herein on the grounds that the petition does not present a substantial federal question.

ARGUMENT

As is indicated in the foregoing Statement of the Case, and confirmed in the petition herein (at page 7, lines 8 through 19), there were originally two issues in this suit:

(1) Was petitioner Associated Dry Goods Corporation carrying on a unitary business within and without the state of Minnesota?

(2) If petitioner was carrying on a unitary business within and without the state of Minnesota, is the apportionment of its net income to Minnesota by the three-factor formula violative of the equal protection or due process clause of the Fourteenth Amendment?

Petitioner has abandoned the second issue, leaving only the first, which is the issue that was dealt with and decided by the Minnesota Tax Court, and affirmed by the Minnesota Supreme Court.

The leading and model case on this issue is *Butler Bros. v. McColgan*, 315 U.S. 501, 62 S.Ct. 701 (1942). In that case this Court held that California could properly treat the taxpayer's business as a "unitary business" where it operated wholesale distributing houses in seven states including California and maintained a central buying division. Inasmuch as there were substantially more unitary aspects to petitioner's business than were present in the *Butler Bros.* case,[1] there is no substantial federal issue presented in this case, and the *Butler Bros.* decision provides a clear statement of the applicable law.

The question whether petitioner was carrying on a unitary business within and without the state of Minnesota is essentially a question of fact to be determined by an examination of all of the relevant aspects of petitioner's business operations. The Minnesota Tax Court made such an examination, and on the basis of that examination and the applicable judicial precedents, including the *Butler Bros.* case, concluded that petitioner was carrying on a unitary business within and without the state of Minnesota. See Petition, Appendix B.

[1] See Findings of Fact, Petition, Appendix B, pp. A-3 thru A-8.

The Tax Court recognized that petitioner's "various divisions operate separately and apart from one another", that "each division tends to run autonomously in its day-to-day operations", and that "the divisions . . . are separate or non-unitary in that each division operates as though it were a separate company. Each division appears to be self-sufficient". (The same was true of the seven wholesale houses in *Butler Bros. v. McColgan*, supra.)[2] But notwithstanding these "non-unitary" aspects, the Tax Court concluded on the basis of the entire evidence that the various divisions of petitioner contribute to the success of the operations of one another, and that petitioner was carrying on a unitary business within and without the state of Minnesota.

It has long been established that this Court will not review a decision of a state court upon a question of fact that is supported by substantial evidence,[3] and the decision that peti-

[2] It is inherent in the nature of the merchandising business that each store or outlet will "operate separately and apart from one another", and will "run autonomously its day-to-day operations". Such operating separateness and autonomy is in no way inconsistent with a merchandising business being a unitary business. *Butler Bros. v. McColgan*, supra; *Maurice L. Rohtschild & Co. v. Commissioner of Taxation*, 270 Minn. 245, 133 N.W.2d 524 (1965); *Walgreen Company v. Commissioner of Taxation*, 258 Minn. 522, 104 N.W.2d 714 (1960), appeal dismissed, 365 U.S. 767, 81 S.Ct. 912; *Western Auto Supply Co. v. Commissioner of Taxation*, 245 Minn. 346, 71 N.W.2d 797 (1955).

[3] *General Motors Corp. v. Washington*, 377 U.S. 436, 441-442, 84 S.Ct. 1564, 1568 (1964); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160, 73 S.Ct. 204, 206 (1952); *Grayson v. Harris*, 267 U.S. 352, 357-358, 45 S.Ct. 317, 319 (1925); *Pure Oil Co. v. Minnesota*, 248 U.S. 158, 164, 39 S.Ct. 35, 38 (1918).

tioner was carrying on a unitary business within and without the state of Minnesota is essentially such a decision.

Petitioner recognizes that this is not a reviewable question, stating: "Petitioner is not asking this Court to review the evidence before the Minnesota Tax Court to determine whether or not Petitioner's enterprise is unitary or non-unitary". (Petition, p. 9.)

However, after making that clear disclaimer, petitioner immediately proceeds to ignore it and to direct the entire thrust of its argument to the contention that it was not carrying on a unitary business within and without the state of Minnesota.

We submit that a re-examination of the evidence, and a redetermination of the question whether petitioner's business was unitary, does not present a substantial federal question that warrants the attention of this Court. This is particularly true in light of the clear statement of the applicable law in *Butler Bros. v. McColgan*, supra, which governs this case.

We therefore respectfully urge that the petition for certiorari herein be denied.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
C. H. LUTHER
Deputy Attorney General
Department of Revenue
Centennial Office Building
St. Paul, Minnesota 55145
Tel.: (612) 296-3421
Attorneys for Respondent